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No. 96-7185

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

GARRIT BATES,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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19 pp

QUESTION PRESENTED

DID THE INDICTMENT IN THIS CASE PROPERLY CHARGE A WILLFUL MISAPPLICATION OF FUNDS IN VIOLATION OF 20 U.S.C. § 1097(a) WHERE IT FAILED TO ALLEGE THE ESSENTIAL ELEMENT OF INTENT TO DEFRAUD?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT:

THE INDICTMENT IN THIS CASE DID NOT PROPERLY CHARGE A WILLFUL MISAPPLICATION OF FUNDS IN VIOLATION OF 20 U.S.C. § 1097(a) IN THAT IT FAILED TO ALLEGE THE ESSENTIAL ELEMENT OF INTENT TO DEFRAUD. 5

A. WHERE, AS HERE, A TERM HAS SETTLED MEANING, CONGRESS IS PRESUMED TO ADOPT THAT MEANING WHEN IT USES THE TERM. . 5

B. WILLFUL MISAPPLICATION HAS HISTORICALLY REQUIRED AN INTENT TO DEFRAUD, WHETHER OR NOT SUCH INTENT IS EXPRESSLY SPECIFIED ON THE FACE OF THE STATUTE. 6

C. USING THE SETTLED MEANING OF WILLFUL MISAPPLICATION IN § 1097 SERVES THE IMPORTANT PURPOSE, FREQUENTLY RECOGNIZED BY CONGRESS AND THIS COURT, OF PREVENTING CONVICTION FOR INNOCENT MISSTEPS. 10

CONCLUSION 13

TABLE OF AUTHORITIES

FEDERAL CASES

Albernaz v. United States,
450 U.S. 333 (1981) 10

Cannon v. University of Chicago,
441 U.S. 677 (1979) 9

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988) 9

Liparota v. United States,
471 U.S. 419 (1985) 10, 11

Morissette v. United States,
342 U.S. 246 (1952) 9, 10

Seals v. United States,
221 F.2d 243 (8th Cir. 1955) 7

United States v. Britton,
107 U.S. 655 (1883) 11

United States v. Christo,
614 F.2d 486 (5th Cir. 1980) 11, 12

United States v. Garcia,
751 F.2d 1033 (9th Cir. 1985) 7

United States v. Kammer,
1 F.3d 1161 (11th Cir. 1993) 11

United States v. Logsdon,
132 F. Supp. 3 (W.D. Ky. 1955), aff'd, 253 F.2d 12 (6th Cir. 1958) 7

United States v. Matot,
146 F.2d 197 (2d Cir. 1944) 8

United States v. Ratzlaf,
510 U.S. 135 (1994) 11

United States v. Schnitzer,
942 F. Supp. 323 (S.D. Tex. 1976) 12

United States v. Vannatta,
189 F. Supp. 937 (D. Haw. 1960) 7

United States v. Wells,
117 S. Ct. 921 (1997), quoting *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992) 5

United States v. X-Citement Video,
115 S. Ct. 464 (1994) 10

STATE CASES

Louis Pizitz Dry Goods Co. v. Fidelity & Deposit Co. of Md.,
136 So. 800 (Ala. 1931) 9

Maryland Casualty Co. v. Farmers State Bank & Trust Co.,
258 S.W. 584 (Tex. Ct. App. 1924) 9

Roseville Trust Co. v. American Surety Co. of N.Y.,
103 A. 182 (N.J. 1918) 9

FEDERAL STATUTES

12 U.S.C. § 592 6

18 U.S.C. § 656 ..... 3, 6, 7, 11

Ch. 106, § 55, 13 Stat. 116 (1864) 6

20 U.S.C. § 1097(a) 1, 2, 5, 6, 7

TREATISES AND OTHER AUTHORITIES

Appleman, INSURANCE LAW AND PRACTICE, § 5670 (1981) 8

COUCH ON INSURANCE, § 46:67 (2d ed. 1982) 8

Thomas Morse, *Bank Insiders and the Willful Misapplication Statute: Toward a More Effective Protection from Self Dealing*, 92 Banking L.J. 715, 722 n.19 (1975) 6

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") of the District of Columbia is a non-profit

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[1] The parties have consented to the filing of this Brief by the National Association of Criminal Defense Lawyers. Their letters of consent have been separately filed with the Clerk of the Court concurrently with the filing of this Brief.

corporation with a membership of more than 8,700 attorneys and 28,000 affiliate members, including representatives from all 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the House of Delegates.

NACDL was founded in 1958 to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage integrity, independence, and expertise of defense lawyers. Among NACDL's stated objectives is the promotion of the proper administration of justice. Thus, the members of NACDL have a vital interest in insuring that the integrity of the federal and state systems of criminal justice are protected.

NACDL's interests necessarily include cases dealing with the construction of federal criminal statutes, issues regarding *mens rea*, and the effect of these issues on future prosecutions. Its interests in this case extend to insuring that the proper scienter requirement in prosecutions pursuant to 20 U.S.C. § 1097(a) is alleged and proved when the government elects to proceed under that statute.

SUMMARY OF ARGUMENT

NACDL supports the petitioner's arguments and the decision of the district court below that dismissed the indictment for failing to allege intent to defraud as a requisite element of the offense charged. One of the arguments advanced by the petitioner in his opening brief is that Congress's use of the terms "knowingly" and "willfully" in § 1097 would seemingly require the greatest degree of mental culpability, which would be intent to defraud in the context of this particular statute. In addition to the petitioner's arguments, NACDL respectfully offers an

independent but related reason to show why intent to defraud is indeed a requisite element of § 1097.

"Willful misapplication" is a legal term of art that has been specifically defined and construed by numerous courts prior to the enactment of the criminal penalties set forth in § 1097. For example, the history of 18 U.S.C. § 656, which criminalizes the willful misapplication of bank funds, indicates that proof of willful misapplication requires an intent to defraud, even though intent to defraud is not specifically stated in the text of the statute. Numerous appellate courts have reached the same conclusion in construing § 656. Similarly, willful misapplication has been defined in the context of insurance guaranty contract cases to require an intent to defraud. Based upon the various constructions of willful misapplication in the common law that include intent to defraud as a requisite element, Congress is presumed to have incorporated the common law meanings of the term "willful misapplication" in § 1097.

In addition, the intent to defraud element of § 1097 also serves the important purpose of distinguishing maladministration, accounting errors, or mere technical violations of civil regulations from the harsh criminal sanctions associated with criminal misapplication statutes. Due to the inherent risk that a jury may infer criminal intent from a violation of a civil regulation, the requirement that the government must show intent to defraud prevents the use of mere technical violations of civil regulations to improperly obtain a conviction under a criminal statute without a showing of fraudulent intent.

For these reasons, intent to defraud is an essential element of § 1097, and serves the important purpose of preventing convictions for innocent or unwary conduct. The

district court's determination that the indictment in this matter fails to allege intent to defraud as a requisite element of the offense was proper.

ARGUMENT

THE INDICTMENT IN THIS CASE DID NOT PROPERLY CHARGE A WILLFUL MISAPPLICATION OF FUNDS IN VIOLATION OF 20 U.S.C. § 1097(a) IN THAT IT FAILED TO ALLEGE THE ESSENTIAL ELEMENT OF INTENT TO DEFRAUD.

It is well settled that an indictment must allege all essential elements of the crime charged. Intent to defraud is an essential element of the offense of willful misapplication, the offense charged in the instant case. The indictment in this case wholly failed to allege that Defendant Garrit Bates acted with intent to defraud. That failure rendered the indictment insufficient as a matter of law. The district court's decision to dismiss the indictment on this ground was proper.

A. WHERE, AS HERE, A TERM HAS SETTLED MEANING, CONGRESS IS PRESUMED TO ADOPT THAT MEANING WHEN IT USES THE TERM.

It is axiomatic that where Congress uses a term that "has accumulated settled meaning under . . . the common law," this Court will "presume that Congress incorporate[d] the common-law meaning of the term" unless the statute otherwise dictates. *United States v. Wells*, 117 S. Ct. 921, 927 (1997), *quoting Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992). In enacting 20 U.S.C. § 1097(a), Congress criminalized the willful misapplication of higher education assistance funds. Although Congress did not, in express words, include a requirement that such misapplication be accompanied by an intent to defraud, such a requirement is clearly found in the

settled meaning of the term "willful misapplication" that is used in § 1097. Accordingly, this element must be charged, and failure of the Government to include the "intent to defraud" element in the indictment in this case mandates reversal.

B. WILLFUL MISAPPLICATION HAS HISTORICALLY REQUIRED AN INTENT TO DEFRAUD, WHETHER OR NOT SUCH INTENT IS EXPRESSLY SPECIFIED ON THE FACE OF THE STATUTE.

When Congress chose to criminalize willful misapplication of higher education assistance funds in 20 U.S.C. § 1097, it was not writing on a clean slate. Willful misapplication has been the subject of criminal sanctions since at least 1864, when the term first appeared in the Act of June 3, 1864 as part of the National Bank Act, which provided criminal penalties for embezzlement or willful misapplication of banking association funds. *See* Ch. 106, § 55, 13 Stat. 116 (1864). *See also* Thomas Morse, *Bank Insiders and the Willful Misapplication Statute: Toward a More Effective Protection from Self Dealing*, 92 BANKING L.J. 715, 722 n.19 (1975). At that time, the statute contained an explicit requirement of an intent to defraud.

While the presence of such an explicit requirement in the 1864 statute might be viewed as an indication that intent to defraud is not subsumed or embedded in willful misapplication itself, any thought along those lines was clearly dispelled by the revision of the statute in 1948. Pursuant to a major revision of federal criminal law that year, the statute, previously codified at 12 U.S.C. § 592, was rewritten and moved to its current location in 18 U.S.C. § 656. At that time, the explicit requirement of intent to defraud was dropped from the statutory terms. Any contention that this change in statutory language

was inadvertent or unintentional is belied by the Revisor's Notes accompanying the revision, which explicitly indicate that the "revised section, without changing in any way the meaning or substance of existing law, clarifies, condenses, and combines related provisions largely rewritten in matters of style." Historical and Revisor's Notes, 18 U.S.C.A. § 656.[2] In this revision, Congress retained the offense of willful misapplication of bank funds, but removed any explicit reference to intent to defraud in the text of the statute. Courts interpreting this Congressional revision shortly after it occurred uniformly concluded that the Revisor's Notes meant what they said - - - that proof of willful misapplication still requires a showing of intent to defraud, despite the absence of such language in the statute itself. *See, e.g., Seals v. United States*, 221 F.2d 243, 245 (8th Cir. 1955); *United States v. Vannatta*, 189 F. Supp. 937, 939 (D. Haw. 1960). As expressed by the judge in *United States v. Logsdon*, 132 F. Supp. 3, 5 (W.D. Ky. 1955), *aff'd*, 253 F.2d 12 (6th Cir. 1958), "the words 'with intent . . . to injure or defraud' were undoubtedly omitted from the revised section as being redundant. Their omission does not change or detract from the former meaning of the statute."[3]

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[2] The Revisor's Notes indicate that the original section contained more than 500 words and was "verbose, diffuse, redundant, and complicated." The changes were designed to maintain the same meaning while doing away with excess words. It is clear that "intent to defraud" was viewed as such an excess.

[3] *See also United States v. Garcia*, 751 F.2d 1033, 1036 (9th Cir. 1985), reaching the same conclusion, that willful misapplication requires an intent to defraud, with regard to a statute that criminalizes a willful misapplication of CETA funds. The court there stated: "The only reason Congress could have considered the explicit requirement of a purpose to injure or defraud redundant was that Congress understood the term 'willful misapplication' to include such an intent by implication." *Id.*

This after-the-fact judicial interpretation is not only consistent with the contemporaneous Revisor's Notes, it also reflects the teaching of one of the best judicial minds of the time shortly prior to the legislative change. Notable is the opinion of Judge Learned Hand, writing for the Second Circuit in *United States v. Matot*, 146 F.2d 197 (2d Cir. 1944), just four years before the statutory change from § 592 to § 656. In *Matot*, Judge Hand, in commenting on the presence of the "intent to defraud" language in § 592, stated his belief that "that construction is unnecessary, for 'willful misapplication' of money presupposes a fraudulent intent . . . ." *Id.* at 198.

Not only do prior and contemporaneous interpretations of § 656 strongly suggest that intent to defraud is an essential component of willful misapplication, subsequent judicial interpretation does so as well. As noted by the author of a comprehensive article on § 656 written in 1975, five years before the enactment of the criminal penalties at issue in this case, "further cases appear to have particularized the intent contemplated by the term [willful misapplication] so that today the required willfulness has become exclusively an intent to injure or defraud . . . ." *Morse*, 92 BANKING L.J., *supra*, at 726 and cases cited (footnote omitted).

This consistent interpretation of "willful misapplication" in criminal statutes to include the element of intent to defraud mirrors a long line of authority in the area of insurance guaranty contracts, the other significant area where the term "willful misapplication" is found. As recognized by both major treatises in insurance law, it is generally held that willful misapplication requires that the acts of conversion "be done with a dishonest or fraudulent intent." Appleman, INSURANCE LAW AND PRACTICE, § 5670 (1981); COUCH ON INSURANCE, § 46:67 (2d ed. 1982). The cases relied on by these treatises to support the implication of an intent to defraud within the meaning of willful

misapplication date from shortly after the turn of the century through the late 1930's. *See, e.g., Louis Pizitz Dry Goods Co. v. Fidelity & Deposit Co. of Md.*, 136 So. 800, 801-02 (Ala. 1931); *Roseville Trust Co. v. American Sur. Co. of N.Y.*, 103 A. 182, 183 (N.J. 1918); *Maryland Casualty Co. v. Farmers' State Bank & Trust Co.*, 258 S.W. 584, 586 (Tex. Ct. App. 1924). These cases were presumptively known to Congress at the time of both its revision of § 656 and its subsequent enactment of § 1097. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988); *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979).

The conclusion is thus inescapable that, in using the term "willful misapplication" to criminalize improper use of higher education assistance funds in § 1097, Congress was incorporating the well-settled requirement that such misapplication must be accompanied by an intent to defraud. It is inconceivable that Congress would have used a term with such a long, consistent history of interpretation unless it intended that interpretation to be followed with regard to § 1097. As this Court said in *Morissette v. United States*, 342 U.S. 246, 250 (1952):

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as

> satisfaction with widely accepted definitions, not as a departure from them.

Morissette was decided before the enactment of § 1097, and Congress is presumed to have been aware of that decision at the time it enacted this statute. *Albernaz v. United States*, 450 U.S. 333, 341-42 (1981).

Congress' use of the term "willful . . . misapplication" in § 1097 includes within its clearly understood meaning and interpretation the requirement of an intent to defraud. Such intent was not alleged in the indictment in this case. Accordingly, that indictment was defective and should properly be dismissed.

C. USING THE SETTLED MEANING OF WILLFUL MISAPPLICATION IN § 1097 SERVES THE IMPORTANT PURPOSE, FREQUENTLY RECOGNIZED BY CONGRESS AND THIS COURT, OF PREVENTING CONVICTION FOR INNOCENT MISSTEPS.

It is a basic and well accepted principle that "an injury can amount to a crime only when inflicted by intention." *Morissette*, 342 U.S. at 250. The requirement of *mens rea* in criminal statutes serves to assure that a "broad range of apparently innocent conduct" is not subjected to criminal sanction. *Liparota v. United States*, 471 U.S. 419, 426 (1985). Just as courts will apply a *mens rea* term where necessary to ensure the appropriate level of scienter consistent with congressional intent, *Morissette*, 342 U.S. at 250; *United States v. X-Citement Video*, 115 S. Ct. 464, 468 (1994), so too must scienter requirements be taken seriously where spelled out in the

statute itself. This is especially true where statutes such as § 1097 are involved. As this Court noted in addressing willful misapplication under § 656, where maladministration rather than true misapplication is involved, no criminal sanctions are appropriate. *United States v. Britton*, 107 U.S. 655, 666-67 (1883). In statutes where the risk of prosecuting innocent missteps is great, *Liparota*, 471 U.S. at 426; where the conduct involved is, as here, not so "obviously 'evil' or inherently 'bad,'" *United States v. Ratzlaf*, 510 U.S. 135, 146 (1994); where, as here, failure to rigorously apply the stated mental element can lead to felony sanctions for simple business misjudgment, courts must take special care to ensure that a stated *mens rea* requirement is given full effect.

That concern is particularly acute with regard to § 1097, as illustrated by both *United States v. Kammer*, 1 F.3d 1161 (11th Cir. 1993), and the indictment in this case. In both *Kammer* and here, much of what was alleged against the defendant relates to an alleged failure to adequately comply with civil regulations. Unless willful misapplication is understood to require an intent to defraud, there will be substantial risk that defendants will be criminally sanctioned for mere violations of technical regulations.

The use by the government of a violation of a civil regulation to obtain or "bootstrap" a conviction under a criminal misapplication statute has drawn strong criticism from several courts of appeals. Most notably, the Fifth Circuit has held that the introduction of evidence involving a violation of a civil banking statute in a criminal prosecution under 18 U.S.C. § 656 was wholly improper and impermissibly infected the very purpose of the criminal trial, which was to determine the elements of criminal misapplication under § 656. *United States v. Christo*, 614 F.2d 486, 492 (5th Cir. 1980). The Fifth Circuit noted that evidence of the civil violation improperly shifted the

jury's focus away from the elements of the criminal statute and may have invited it not only to infer criminal intent, but to convict the defendant based solely on the violation of civil law. *Id.* It is well established that violations of civil regulations alone cannot amount to a criminal offense. *United States v. Schnitzer*, 942 F. Supp. 323, 329 (S.D. Tex. 1976).

The grave concerns raised when there is an interplay between civil regulations and a criminal offense are heightened if intent to defraud is not a requisite element of the criminal offense. Without requiring intent to defraud, the chances that a jury may convict an innocent person for maladministration, accounting errors, or the mere violation of civil regulations are enhanced. These concerns are present in this case due to the fact that the indictment refers to the civil regulations governing refunds of student loans. The only way to avoid the untoward result of obtaining a conviction based on a violation of a civil regulation or for poor business judgment is recognition of the requirement of intent to defraud within the meaning of willful misapplication. Intent to defraud serves the purpose of separating purely innocent conduct, such as maladministration or the violation of technical civil regulations, from conduct that is appropriately considered criminal.

CONCLUSION

For the foregoing reasons, the decision of the Seventh Circuit Court of Appeals should be vacated and reversed and the district court's decision that dismissed the indictment for failure to allege a requisite element should be affirmed.

Respectfully submitted,

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